Supreme Court, U.S.
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No. 06-422

In The

Supreme Court of the United States

SHAUNA GOMES, et al.,

Petitioners,

v.

DEBORAH A. WOOD, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court review Petitioners' challenge to the "reasonable suspicion" standard when the Tenth Circuit's application of that standard was not dispositive of the case?

2. Were Respondents given fair warning that their conduct was unconstitutional where the Tenth Circuit had not yet announced a standard for determining when state official's removal of a child from a parent's custody violates due process?

BRIEF IN OPPOSITION

Respondents Megan Annes, Kerri Ketterer, Tess Blackmer and Deborah A. Wood, submit this brief in opposition to a writ of certiorari to review the published opinion of the Tenth Circuit Court of Appeals in this case, *Gomes v. Wood*, 451 F.3d 1122 (10th Cir. 2006).

JURISDICTION

The Tenth Circuit issued its opinion on June 27, 2006. The Gomeses' petition for a writ of certiorari was timely filed on September 20, 2006.

STATEMENT OF THE CASE

Respondents incorporate by reference the statement of facts in the opinion below. Based on these facts, the court of appeals affirmed the district court's grant of qualified immunity, but on different grounds. The court of appeals concluded that genuine issues of material fact regarding whether Respondents had reasonable suspicion that an emergency existed precluded qualified immunity under the first prong of the qualified immunity analysis, i.e., whether the facts established a constitutional violation. The court granted qualified immunity to Respondents under the second prong of the analysis, i.e., whether the relevant law was clearly established, because the court's prior decisions had not given Respondents fair warning that, under the circumstances here, removing the child from her parents' custody without a pre-deprivation hearing would violate the parents' rights.

REASONS TO DENY THE PETITION

I. The conflict among the circuits over the precise formulation of the Due Process standard used in determining whether a constitutional violation occurred is irrelevant to the ultimate outcome of this controversy

Petitioners' first two questions presented, dealing with the first prong of the qualified immunity analysis, do not cleanly present legal issues for this Court's review because Respondents prevailed on other grounds. Under this first prong, a court looks to "whether plaintiff's allegations, if true, establish a constitutional violation." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). To assess whether Respondents' conduct was a constitutional violation, the Tenth Circuit adopted a "reasonable suspicion" formulation of the Due Process standard. Under this standard, "state officials may remove a child from the home without prior notice and a hearing when they have reasonable suspicion of an immediate threat to the safety of the child if he or she is allowed to remain there." *Gomes*, 451 F.3d at 1130. Applying this standard, the Tenth Circuit determined that qualified immunity under the first prong of the analysis could not be granted because "genuine issues of material fact exist as to whether [Respondents] had reasonable suspicion." *Gomes* at 1135.

Due to these factual issues, the Tenth Circuit did not dispose of the case under the first prong of the qualified immunity analysis, but proceeded to the second prong, which requires a court to determine "whether the law clearly established that the [state officials'] conduct was unlawful in the circumstances of the case." *Saucier*, 533 U.S. at 201. The Tenth Circuit granted qualified immunity under this second prong because it had not yet announced, at the time of the

events in this case, the due process standard for emergency child removals without a pre-deprivation hearing. *Gomes* at 1137. Because the second prong was the dispositive issue here, the conflict among the circuits, which relates to what standard is used under the first prong, is irrelevant to the ultimate outcome of this case.

Moreover, the conflict among the circuits over the significance of whether state officials have time to get a warrant is not a well-developed conflict. Only the Second Circuit has focused solely on the availability of a warrant as the determinative factor in assessing whether an emergency exists, and that came in a 2-1 decision which did not address the approach taken by other circuits. *Tenenbaum v. Williams*, 193 F.3d 581, 594-96 (2d Cir. 1999). While three circuits have now squarely rejected the Second Circuit's approach, the Second Circuit has not considered the issue since the split in the circuits arose. *See Roe v. Texas Dep't of Protective and Regulatory Services*, 299 F.3d 395, 403-04 (5th Cir. 2002); *Gomes*, 451 F.3d at 1130; *Doe v. Kearney*, 329 F.3d 1286, 1297 (11th Cir. 2003). Due to this limited development, this Court should deny the petition and allow the circuits time to more fully explore the issue. Additionally, Petitioners failed to seek *en banc* review to allow the full Tenth Circuit to address the conflict.

II. The Tenth Circuit's determination that Respondents were not given fair warning that their conduct was unconstitutional does not conflict with this Court's decisions

The only issue raised in the petition relevant to the ultimate outcome of the case – whether the Tenth Circuit erred in concluding the law was not clearly established – presents no compelling reason for this Court to grant the

petition. Determining whether Respondents' conduct was unconstitutional required the court to apply its newly pronounced "reasonable suspicion" standard, but the inquiry into whether the law was clearly established looked not to the newly articulated standard, but to what legal guidance Respondents had been given *at the time of the conduct*. Because the Tenth Circuit had not announced the reasonable suspicion standard, had not identified the availability of obtaining a warrant as an important consideration, and had stated that "considerable deference should be given to the judgment of responsible government officials in acting to protect children from perceived imminent danger or abuse," Respondents were not given fair warning that their conduct was unconstitutional. *Gomes*, 451 F.3d at 1136-37 (summarizing the Tenth Circuit's pronouncements on the governing Due Process standards for child removals) (citations omitted). The Tenth Circuit's pronouncements were so unclear that the Eleventh Circuit, in construing a Tenth Circuit decision issued two years after the events here, misapprehended what Due Process standard the Tenth Circuit had adopted. *Gomes* at 1129 (noting that Eleventh Circuit incorrectly read Tenth Circuit opinion as adopting probable cause standard). Where another circuit court could not correctly divine the standard, it would be unfair to require the Respondents to have anticipated what standard the Tenth Circuit eventually would adopt.

And contrary to Petitioners' assertion, the Tenth Circuit's "clearly established" analysis does not conflict with this Court's precedent. Petitioners' reliance on *Hope v. Pelzer*, 536 U.S. 730 (2002), is misplaced. That case addressed the effect of state statutes on the inquiry under the *third* prong of the qualified immunity analysis, not under the "clearly established" prong. Compliance with state law

only becomes relevant if a court reaches the third prong of the qualified immunity test, which the Tenth Circuit did not. *See Gomes* at 1138 n.6 (declining to address the third prong of the qualified immunity analysis since Respondents prevailed on the second prong). Moreover, the Tenth Circuit's decision does not render all state child removal statutes meaningless, as Petitioners contend. Rather, it correctly precludes a state law violation from automatically becoming a federal constitutional violation. The decision below does nothing to preclude a state actor from being held in violation of state law.

CONCLUSION

The petition for a writ of certiorari should be denied because the Tenth Circuit correctly determined the dispositive issue in this case – that Respondents were not given fair warning that their conduct was improper since the Tenth Circuit had not yet articulated the "reasonable suspicion" standard. Further, the petition should be denied because resolution of the conflict among the circuits on the Due Process standard is not relevant to the ultimate outcome of this case.

Respectfully submitted,

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